STATE OF SOUTH CAROLINA

BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NOS. 2017-370-E, 2017-207-E, and 2017-305-E

Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent Request of the Office of Regulatory Staff for Rate Relief to South Carolina Electric & Gas Company's Rates Pursuant to S.C. Code Ann. § 58-27-920	REPLY IN SUPPORT OF MOTION TO BIFURCATE OR, IN THE ALTERNATIVE, TO SEQUENCE THE HEARING

The South Carolina Coastal Conservation League ("CCL") and Southern Alliance for Clean Energy ("SACE") file this reply in support of their motion to bifurcate the above-captioned consolidated dockets or, in the alternative, to sequence the hearing (the "Motion").

In their Response in Opposition to the Motion, South Carolina Electric & Gas Company ("SCE&G") and Dominion Energy, Inc. ("Dominion") (collectively, "the Companies") do not deny that their application is structured so that the Commission must accept the Companies' own estimates of how much they can charge customers over the

next several decades for the abandoned V.C. Summer Units 2 and 3 Project in order for the Dominion merger and associated customer benefits package to move forward. In fact, the Companies have dug in, stating that Dominion Energy offered its plan in order to "resolv[e] the full range of rate and regulatory issues associated with the [V.C. Summer] Project[.]" Response at 6. But the fact that the Companies want to ensnarl the prudency decision and treatment of costs associated with the abandoned V.C. Summer Units 2 & 3 Project together with the proposed merger and three alternative cost recovery options does not mean that the issues must be decided together. To the contrary, the Commission has broad discretion to bifurcate or sequence the hearing. Without bifurcation, it will be difficult for the Commission to determine the prudency of abandonment and the related question of how much of the V.C. Summer costs can be recovered from ratepayers for the project without the distraction of the merger and alternative cost recovery options. Similarly, it is not possible to properly evaluate whether the merger offer is in customers' best interest when there is so much uncertainty about SCANA Corporation's ("SCANA") valuation.

ARGUMENT

I. Significant Changes in the Last Six Months, Including Actions By the South Carolina General Assembly, Make Bifurcation Appropriate.

The Companies' contention that CCL and SACE should have moved to bifurcate six months ago ignores the intervening changes that in fact prompted CCL and SACE to file their Motion. Since January 2018, there have been important revelations that call into question the "prudency" of SCE&G's actions and expenditures related to the V.C. Summer project. For example, an audio recording of a former top accounting executive

at SCANA accusing company officials of mismanaging the project became public;[1] other now-public records indicate that SCANA officials doubted the project would be completed on schedule;[2] SCANA launched an internal probe, adding another investigation on top of those initiated by state and federal agencies;[3] and the Senate commissioned and released a report showing that SCE&G could significantly cut its customers' bills without forcing the company into bankruptcy.[4] In addition, the South Carolina General Assembly has ordered a fifteen percent rate cut, and a federal judge denied SCE&G's request to prevent the cut from going into effect. 2018 South Carolina Laws Act 258 (H.B. 4375) § 3; *South Carolina Elec. & Gas Co. v. Whitfield et al.*, No. 3:18-CV-01795, 2018 WL 3725742 (D.S.C. Aug. 6, 2018), *appeal filed* (Aug 8, 2018). That same judge has also signaled that SCE&G's ability to recover costs for the abandoned V.C. Summer project may be less than the Companies' Application Exhibit 13 calculates they are entitled to. *South Carolina Elec. & Gas Co.*, 2018 WL 3725742, at *11-*14 (noting that SCE&G may not claim an entitlement to certain costs after

[1] Andrew Brown and Thad Moore, *Top SCANA Accountant Accused Executives of Mismanaging S.C. Nuclear Plant To Prop Up Earnings*, The Post & Courier (Mar. 29, 2018), https://www.postandcourier.com/business/top-scana-accountant-accused-executives-of-mismanaging-s-c-nuclear/article_743584d4-3295-11e8-8465-47a2cc905671.html.

[2] Andrew Brown and Thad Moore, *SCANA Official Openly Doubted Nuclear Project Would Finish On Time, Former Westinghouse Managers Say*, The Post & Courier (May 6, 2018), https://www.postandcourier.com/business/scana-official-openly-doubted-nuclear-project-would-finish-on-time/article_b25ce48e-4dff-11e8-9210-a7619a1687e4.html.

[3] Thad Moore, *SCANA Recruits Outsiders to Investigate Insiders Over Failed Nuclear Project*, The Post & Courier (July 13, 2018), https://www.postandcourier.com/business/scana-recruits-outsiders-to-investigate-insiders-over-failed-nuclear-project/article_a155bf5e-86e8-11e8-924b-6fd7f252f286.html.

[4] Andrew Brown and Thad Moore, *SCE&G Could Cut Electric Rates At Least 13 Percent Without Going Bankrupt, New Study Finds*, The Post & Courier (Mar. 27, 2018), https://www.postandcourier.com/business/sce-g-could-cut-electric-rates-at-least-percent-without/article_931583ae-3065-11e8-add8-97bb60dcf3cf.html.

abandonment because the project is not "constructed or being constructed" and that the Commission has discretion to deny recovery of costs dependent on SCE&G's prudency showing). In other words, according to Judge Childs, SCE&G might not be entitled to recover ***anything*** right now and also may not recover anything in the future ***unless*** the Commission finds those costs prudent.

In the last six months, the South Carolina General Assembly also passed a Resolution setting the schedule for Commission dockets "in which requests were made pursuant to the Base Load Review Act." 2018 South Carolina Laws Joint Resolution Ratification No. 285 (S. 0954), § 1. The language in the resolution specifically distinguishes requests made pursuant to the Base Load Review Act. Under this resolution, the Commission clearly may bifurcate Docket Nos. 2018-207-E, 2017-305-E, and 2017-370-E into two distinct dockets: (1) to resolve the Companies' requests made pursuant to the Base Load Review Act set out in South Carolina Code of Laws Title 58, Chapter 33, Article 4, and (2) to resolve the Companies' requests made pursuant to other authorities, *i.e.* the merger.

Contrary to SCE&G and Dominion Energy's contention that the merger proposal and the associated customer benefits plan or alternative proposals involve requests made pursuant to the Base Load Review Act, Response at 4, their Application makes clear that the Base Load Review Act's relevance to the merger ends with their request that the Commission adopt Exhibit 13[5] as the updated and approved capital cost schedule under Base Load Review Act Sections 280(K) and 270(E) (S.C. Code Ann. § 58-33-280(K) and S.C. Code Ann. § 58-33-270(E)). Application at 47-48; Kochems Direct Testimony at 5

[5] Exhibit 13 is updated to reflect costs through December 2017 in Exhibit KRK-1, attached to the Direct Testimony of Kevin R. Kochems.

lns 1-8. The Customer Benefits Plan, No Merger Benefits Plan, or Base Request would then take Exhibit 13 as "the starting point for calculating the amounts to be recovered" and make certain adjustments with write-offs and offsets to arrive at the proposed rate schedules. Kochems Direct Testimony at 6, lns 6-20. Even though the Companies style their Application as requesting approval of each of the three cost recovery plans under the Base Load Review Act,[6] the Base Load Review Act does not actually have anything to do with any of the three alternative cost recovery options; S.C. Code Ann. § 58-27-870(F) does.

Just because the Companies do not want to pursue the merger or customer benefits plan absent assurances about the costs they may properly recover under the Base Load Review Act does not mean that the Commission should not first consider Base Load Review Act requests separately from the merger and three cost recovery option requests and rule upon them in an initial proceeding that follows the schedule set forth in Joint Resolution Ratification No. 285. If necessary after disposition of the first proceeding, the Commission could address the merger and three cost recovery option requests next year. Given the compressed timeframe required in the Resolution, this would allow for a far more orderly and considered process to resolve the important

[6] *See, e.g.*, Application at 12 ("The Parties also seek approval of the Customer Benefits Plan under the provisions of S.C. Code Ann. § 58-33-280(K)"); *id*. at 13 ("If the Merger does not close, then SCE&G seeks approval of the No Merger Benefits Plan under the provisions of S.C. Code Ann. § 58-27-870(F), and S.C. Code Ann. § 58-33-280(K). As a final alternative, if the Merger does not close and if the Commission does not approve the No Merger Benefits Plan, SCE&G seeks approval of the Base Request under that same statutory authority."), and *id.* at 13-14 ("Under both the No Merger Benefits Plan and the Base Request, SCE&G seeks a determination that the NND Project costs, which were not reviewed and approved for inclusion in rate recovery in prior revised rates proceedings, . . . are properly included in the cost schedules for the project in abandonment under S.C. Code Ann.§ 58-33-270(E).").

questions surrounding the V.C. Summer abandonment, in line with the Legislature's intent, as evidenced by their finding that "serious questions have arisen regarding the prudency of incurred costs that have led to rate increases pursuant to the BLRA for the abandoned Project, including SCANA's apparent failure to avoid or minimize costs that should have been avoided or minimized since at least 2011." 2018 South Carolina Laws Joint Resolution Ratification No. 285 (S. 0954).

Finally, the Motion is not untimely or late, and the Commission should grant it. CCL and SACE filed well before the timeliness deadline set out in South Carolina Regulation 108-829(A), and South Carolina courts have bifurcated trials with far less time left before trial. *See, e.g., Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 108, 109, 512 S.E.2d 510, 517 (Ct. App. 1998) (judge ordered bifurcation about three weeks before trial). SCE&G and Dominion are the only parties that oppose the Motion and several parties have indicated support,[7] further undercutting the Companies' argument that the Motion was untimely and that bifurcation would be disruptive, disorderly, and burden other parties.

It is disingenuous for the Companies to argue that CCL and SACE should have made a motion to bifurcate before Order No. 2018-80 when the Companies themselves acknowledged that Senate Bill 954—which later became the Resolution—"has a direct impact upon the timing of the consummation of the merger between SCANA Corporation and Dominion Energy[.]" Joint Petitioners' Notice of Withdrawal of Petition for Rehearing, Feb. 20, 2018. SCE&G and Dominion voluntarily withdrew their petition for

[7] *See* Letters of Support from Intervenors Friends of the Earth and Sierra Club (dated Aug. 1, 2018), Frank Knapp (dated Aug. 8, 2018), William Dowdey (dated Aug. 11, 2018), and Lynn Teague (dated Aug. 11, 2018).

reconsideration of Order No. 2018-80 because they felt certain amendments to the bill would shape the timing of the Commission's final order. CCL and SACE similarly refrained from acting on the Commission's Order until the General Assembly fully set forth the scope of its timing mandate when the Resolution became law in July. In fact, the Resolution, not any prior order or pleading, set the timetable for both a hearing and final order on any Base Load Review Act dockets. CCL and SACE's Motion follows closely upon the heels of that Resolution in an effort to streamline the Base Load Review Act proceeding to achieve judicial efficiency.

II. The Public Service Commission Has Broad Discretion to Bifurcate Or Sequence the Hearing.

The Commission has broad discretion to bifurcate proceedings to further convenience, avoid prejudice, or promote expedition and economy. S.C. Rules of Civil Procedure Rule 42(b); *see* Order No. 2008-490, Docket No. 2008-94-S, July 25, 2008 (Commission Order bifurcating docket, separating particular issues for hearing from other issues expected to be resolved through settlement); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000) (bifurcation left to "sound discretion of the trial court"); *Giles v. Parker*, 304 S.C. 69, 75, n.1, 403 S.E.2d 130, 133 n.1 (Ct. App. 1991) (bifurcation well within discretion of trial judge as South Carolina Rule of Civil Procedure 42(b) "provides . . . that the court may provide for ***separate trials of any issue*** . . . .") (emphasis added).

Bifurcation is frequently used to preserve judicial economy by reducing the number of witnesses that might be called, or by potentially resolving issues in the first phase that could end litigation or limit issues in the second phase. *See The Winthrop Univ. Trustees for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 166,

791 S.E.2d 152, 165 (Ct. App. 2016) (accepting circuit court's reasoning that it would save time and resources to try the issues of liability and damages in different phases because most of the damages witnesses would not be called during the liability phase)[8]; *Stone v. Thompson*, 418 S.C. 599, 605, 795 S.E.2d 49, 52 (Ct. App. 2016), *cert. granted* (Dec. 14, 2017) (holding that family court properly exercised its discretion when bifurcating divorce action to determine if common law marriage existed before deciding issues of divorce and equitable division; family court bifurcated the trial "to save time and resources on the remaining issues if it found that a common law marriage did not exist."); *Creighton*, 334 S.C. at 517, 512 S.E.2d at 109 (holding that trial judge did not abuse his discretion when he bifurcated liability and damages portions of slip and fall case after finding "it would be significantly shorter to try the liability phase of the case separately because of the extensive medical testimony regarding [plaintiff's] injuries, as well as the numerous discovery problems related thereto[,]" and would also "eliminate the expense of having out-of-state doctors testify" if jury entered verdict for defendant concerning liability).

The Commission should grant the Motion because bifurcating consolidated dockets 2017-207-E, 2017-305-E, and 2017-370-E would save time and resources. Several of SCE&G and Dominion's witnesses will not need to participate in a hearing on the prudency of abandonment and resulting ratepayer financial burden for the V.C.

[8] In a certain light, this is exactly the question here. The Commission must first ascertain whether SCE&G is "liable" for any imprudent expenses. Only after such a finding can the Commission consider whether the merger is the best "remedy" for SCE&G ratepayers.

Summer Units 2 & 3 project.[9] In fact, it is hard to imagine a scenario where ***any*** Dominion witness would participate in a prudency review of how SCE&G's handled the V.C. Summer project. In addition, resolving prudency issues first could obviate the need for the Commission and other parties to even have a second hearing on Dominion's proposed merger. The Joint Applicants have repeatedly stated that the merger is conditioned upon approval of the customer benefits plan ***as proposed***, which is in turn conditioned upon endorsement of the cost schedule contained in Exhibit 13 ***as proposed***. *See, e.g.*, Application at 2-3. Dominion has also publicly stated that if there are "material changes [to] the grounds" for its proposal[10]—for example, if the Commission finds certain costs related to the V.C. Summer project are imprudent and not recoverable—

[9] SCE&G asserts in its response that under bifurcation witnesses "will have to be called to the stand twice, cross examined twice, and redirected twice[,]" and that it would be difficult to schedule experts and other witnesses. Response at 7. However, most witnesses discuss just one of the two issues proposed to be bifurcated—either the prudency of abandonment and costs to be borne by ratepayers or the merger and three cost recovery plans presented in the application. For example, Witnesses Young and Lynch discuss the prudency of abandonment, while Witnesses Blue, Farrell, Chapman, Hevert, Rooks, Kochems, Lapson, and Griffin discuss the merger and/or cost recovery plans. Those witnesses that discuss both issues largely refer and defer to the testimony of other witnesses to make their points. For example, Witness Addison refers to the testimony of Witnesses Griffin, Kochems, and Rooks, noting that they provide details on the cost recovery plans and proposed rate riders. Addison Direct Testimony at 44, 46, 47. In addition, courts interpreting the nearly-identical Federal Rule of Civil Procedure have noted that the fact that some witnesses may have to appear twice is "unfortunate," but does not necessarily outweigh the value of bifurcation to the court and other parties. *Ellison v. Rock Hill Printing & Finishing Co.*, 64 F.R.D. 415, 418 (D.S.C. 1974).

[10] Robert Dalton, *Dominion threatens to leave SCE&G deal if South Carolina lawmakers cut rates*, UtilityDive (Mar. 29, 2018) https://www.utilitydive.com/news/ dominion-threatens-to-leave-sceg-deal-if-south-carolina-lawmakers-cut-rate/520296/; Avery Wilks, *Dominion Threatens to Cancel SCANA Deal, Senators Ready to Slash SCE&G Bills By 13%*, The State (Mar. 28, 2018), https://www.thestate.com/news/ politics-government/politics-columns-blogs/article207161094.html.

Dominion will withdraw its proposal.[11] Bifurcation has the potential to save the Commission and parties, including Dominion, a substantial amount of time and expense.

The Supreme Court of South Carolina has also recognized that bifurcation is particularly useful to "help[] clarify and simplify the issues" in complex cases. *Durham v. Vinson*, 360 S.C. 639, 644–45 n.2, 602 S.E.2d 760, 762 n.2 (2004) (encouraging bifurcation of issues of actual and punitive damages in complex medical malpractice case). Interpreting Federal Rule of Civil Procedure Rule 42(b), which is substantively identical to the South Carolina Rule, the Fourth Circuit Court of Appeals has similarly recognized that bifurcation should be used to clarify and simplify issues, especially where determination of one issue may be highly prejudicial or confusing to the resolution of another issue. *See, e.g., Dixon v. CSX Transp., Inc.*, 990 F.2d 1440, 1442-44 (4th Cir. 1993) (trial judge abused discretion in failing to bifurcate federal and state law claims under the circumstances because plaintiffs' evidence—though relevant to federal law claim—was "incitive" and "irrelevant" with regard to the plaintiffs' state law claims; having to resolve both claims at once resulted in "considerable jury confusion.").

The Companies complain that resolving the Base Load Review Act requests first might "deprive" the Companies of the opportunity to "present[] their proposals for resolving the regulatory and rate issues arising out of the [V.C. Summer Units 2 and 3] Project at this point in the proceedings where those plans can receive meaningful and appropriate consideration in light of the issues they are intended to address." Response at 6. But any such "deprivation" is not relevant to the question of whether bifurcation is appropriate. The legal standard in *Creighton* merely requires the Commission to

[11] *See also* Addison Direct Testimony at 43-44 (noting conditions of merger closing).

determine that the "***issues***" to be addressed in each phase of bifurcation are distinct enough that separation will "not result in injustice." *Creighton,* 334 S.C. at 108, 512 S.E.2d at 516. The standard is designed to, for example, avoid bifurcation where overlapping substantial evidence would complicate the fact-finding duties of the Commission.

In any event, this alleged issue does not really exist here. Under the Base Load Review Act, the Commission must determine whether SCE&G's decision to abandon was prudent. That involves two issues: (1) the timing and (2) the costs. SCE&G and Dominion offer in their application a discount from the costs in Exhibit 13. But that discount is irrelevant to whether SCE&G customers must legally pay Exhibit 13 costs. Under the law, SCE&G customers may owe ***far less than*** what is set out in Exhibit 13, regardless of whether Dominion closes the merger.

The Commission should grant the Motion because the issues of prudency of abandonment and how much SCE&G customers must pay in future decades for the V.C. Summer Units 2 & 3 are distinct from either the proposed business combination of SCANA and Dominion or the associated customer benefits plan or alternative proposals for how to burden customers with the nuclear project costs. If SCANA and Dominion are unable to get Commission approval for the merger and recovery plans due to the Commission's decision regarding the prudency of V.C. Summer abandonment, that is a result of the conditions the Companies self-imposed that require approval of Exhibit 13 for the merger to go through. It has nothing to do with any issue overlap. In addition, the Companies admit that the merger and cost recovery plans are dependent on approval of the V.C. Summer project cost schedule in any case, regardless of whether bifurcation

occurs, which makes it all the more logical to bifurcate so that parties can focus on the abandonment issues and avoid the extra work of litigating the merger and cost recovery plans if the Commission declares certain costs imprudent. Finally, if it is the Companies' intention to influence the Base Load Review Act-related determinations by inclusion of the merger proposal and cost recovery options, this makes bifurcation all the more necessary to avoid confusion and prejudice to other parties and SCE&G customers.

CONCLUSION

For the reasons set forth above, the Commission should issue an order bifurcating the proceeding for consolidated dockets 2017-207-E, 2017-305-E, and 2017-370-E or, in the alternative, an order sequencing the hearing of the consolidated dockets.

Respectfully submitted this 17th day of August, 2018.

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